No. 11,549

In the

United States Circuit Court of Appeals

For the Ninth Circuit

TANFORAN COMPANY, LTD., a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Petition for Rehearing

Appeal from the District Court of the United States for the Northern District of California, Southern Division.

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SUBJECT INDEX

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Appeal from the District Court of the United States for the Northern District of California, Southern Division.

The appellant, Tanforan Company Ltd., respectfully prays for a rehearing of this cause on the ground that the opinion of the Circuit Court entirely overlooks the undisputed, uncontradicted and admitted facts pleaded in appellant's complaint in the Court below. The decision of this Honorable Court in effect holds that the restoration agreement entered into by Tanforan with the government constituted a satisfaction of judgment, notwithstanding allegations to the effect that the parties never intended it as a satisfaction of judgment; notwithstanding allegations that there was a failure or want of consideration therefor; notwithstanding allegations that said contract was entered into under mutual mistake of fact or of law; or notwithstanding allegations that said contract was entered into upon certain conditions which were not fulfilled.

The decision of this Honorable Court overlooks the fact that the Court below granted the government's motion to dismiss upon admittedly erroneous grounds and not upon the ground that the agreement constituted a satisfaction of the judgment.

The opinion of this Honorable Court fails to distinguish between a release of the government's *obligation* to restore the premises, and the *right* of Tanforan to restore its premises as a part of the consideration awarded it in the condemnation decree, which compensation cannot be modified or diminished by the legislative or administrative branches of the government.

If we were to assume, without conceding, that the restoration agreement operated as a satisfaction of the judgment, such a determination would not be decisive and the opinion of this Honorable Court fails to take into consideration that facts were pleaded in Tanforan's complaint which justified equitable relief from the effect of such a satisfaction of judgment, which facts, upon a motion to dismiss, must be assumed to be true. The issue presented by this appeal is not merely whether the agreement constituted a waiver of Tanforan's right of restoration, but also whether the pleaded facts would justify *relief from the effect of the agreement* even if it did constitute a satisfaction of the judgment.

In arriving at its decision this Honorable Court determined questions of fact. In its decision on matters of law this Honorable Court entirely disregarded the authorities in support of the legal questions presented by this appeal. A rehearing is sought in order that erroneous conclusions of law enunciated by the decision of this Honorable Court may be corrected and a miscarriage of justice averted.

WHETHER OR NOT THE JUDGMENT IN THE CONDEMNATION SUIT WAS SATISFIED IS A MATTER TO BE DETERMINED UPON THE EVIDENCE AND NOT FROM THE FACTS STATED IN APPELLANT'S COMPLAINT. ON A MOTION TO DISMISS, EVERY CONTENDMENT MUST BE TAKEN IN FAVOR OF THE SUFFICIENCY OF THE COMPLAINT, AND IF ANY RELIEF WHATEVER WAS POSSIBLE THE CAUSE SHOULD HAVE GONE TO TRIAL.

This is an appeal from an order granting appellee's motion to dismiss the ancillary and supplemental bill in equity filed below by Tanforan to prevent interference with the enforcement of the judgment of the District Court. While the government moved for a dismissal on the ground that the action had been concluded, and the judgment therein had been satisfied by agreement of the parties, the Court below granted the motion to dismiss on procedural grounds not raised by the appellee. The decision of this Honorable Court is to the effect that the restoration agreement constituted a satisfaction of the judgment. The pleadings of Tanforan set forth facts which are not disputed nor controverted by the government. The undenied allegations are that the restoration agreement did not constitute a satisfaction of the judgment and that the parties never intended that the judgment be satisfied insofar as the right of Tanforan to restore its premises were concerned. Upon a motion to dismiss, the allegations of appellant's pleadings must be deemed true. Under the allegations of appellant's pleadings appellant was entitled to the

equitable relief sought, regardless of the wording of the agreement between the parties.

A motion to dismiss is in the nature of a demurrer and assumes the truth of the allegations. If it is true, as alleged by Tanforan, that the restoration agreement was not a full satisfaction of the judgment (T. R., p. 42), that the whole purpose of the settlement was to shift the burden of expense for the performance of the work of restoring the premises from the United States to the Tanforan Company, Ltd., and *it was always well understood by the parties to the agreement that the Tanforan Company, Ltd., was asserting and would continue to assert its rights under the terms of the judgment entered in the above-entitled action* to proceed with and to perform and complete the work of restoration (T. R., p. 40), and that the settlement agreement was signed and executed by the Tanforan Company, Ltd., *upon the understanding and assurance that nothing contained therein would interfere with or obstruct its right to continue the work of restoring its property and in putting its premises in condition so that they could be used profitably and produce an income.* (T. R., p. 41), and if the other allegations contained in the complaint and affidavit of Guy M. Standifer (T. R., p. 38) are true, (and for the purpose of the motion to dismiss they must be taken as true) then it can not be said that the restoration agreement effected a satisfaction of the judgment. Such a holding is diametrically opposed to the allegations of appellant's complaint (admittedly true).

In granting the motion to dismiss, the Court below precluded proof of the facts alleged, which facts, if proven, would entitle the appellant to the relief sought. The Court below did not decide, as did this Honorable Court, that the restoration agreement constituted a satisfaction of the judgment. It granted the motion to dismiss on the ground that the procedure adopted by the appellant was improper. The memorandum opinion and order dismissing appellant's application says:

> "It seems hardly necessary to point out that this so-called application is, in truth, a complaint in equity in which Tanforan Company, Ltd., is the plaintiff and the United States, its Civilian Production Administration and officers, agents and employees thereof, are defendants. It is wholly unrelated, in substance, to the case of *United States v. Certain Lands, etc.* An allegation in the complaint that the Order of the Civilian Production Administration was 'in contemptuous willful disregard of the judgment and order of this Court' is the pleader's erroneous conclusion, which is refuted by the obvious fact that Tanforan Company, Ltd., the real plaintiff herein, *predicates its prayer for relief solely on the alleged agreement which was entered into approximately one year after the judgment was entered.* Further discussion would be superfluous." (Italics ours).

It seems clear that the Court below believed that the relief sought should have been set up in an independent suit in equity and that Tanforan's complaint was unrelated to the condemnation suit. *The appellant did not predicate its prayer for relief on the alleged agreement as stated in the opinion of the lower Court.*

It clearly and unequivocably based its prayer for relief *upon the judgment in the condemnation suit.* It set up the agreement in its pleading simply to place all the facts before the Court and alleged facts which are sufficient to justify a holding that the restoration agreement did not constitute a satisfaction of the judgment, nor bar relief to the appellant under the judgment.

It is apparent from the opinion of the Court below that the Court believed that Tanforan's application was a complaint in equity in which Tanforan Company, Ltd., was the plaintiff and the United States and its agencies the defendants. The trial Court must have believed that a cause of action was stated but that it had no proper place in the principal condemnation action. We respectfully submit, under the authorities cited herein, that it had a proper place in the condemnation action and that an independent suit was not necessary. That being true, upon a motion to dismiss, every intendment must be taken in favor of the complaint, and if any relief whatever was possible the cause should have gone to trial.

As stated in *Martin v. Brown*, 294 F. 441:

> "It is unnecessary to do more than generalize upon the intendment of the bill. It may very well be that the charges made cannot and will not be substantiated; that it may develop, upon hearing, that complainants are estopped from being accorded the relief in whole or in part to which they lay claim; but this Court cannot anticipate such a result, particularly when the trial Court upon the face of its ruling concedes that a case is stated against some of the defendants, when such finding is sustained by the allegations of the

bill, and when it appears that all of the defendants are at least proper, if not necessary, parties to a determination of the full extent of the relief which may flow from the cause of action stated."

The case of *Duell v. Brewer*, 92 F. (2d) 59, involved an appeal from a decree in equity dismissing a bill for insufficiency upon its face. The Court held that every intendment must be taken in its favor, and if any relief whatever was possible, the cause should have gone to trial, and the Court reversed the decree of dismissal and remanded the cause.

In *Rectangle Ranche Co., v. Board of Commissioners*, 96 F. (2d) 825, the Court said:

"From the briefs of appellee here and from the proceedings below it is quite plain that the petition was dismissed not because of the view that it failed to state a cause of action, but because of the insistence of the motion and in the argument in support of it that the deed to Rose made before the suit was filed had rendered the controversy moot.

"We agree with appellant that the effect of this ruling was to determine the merits against it, not after a hearing, but upon preliminary motion. As the plaintiff's bill stood, it presented a real controversy within the jurisdiction of the Court, the determination of which required a hearing on the merits, or at least a determination of whether there was equity in the bill. The motion the Court sustained was a motion to dismiss, not for want of equity in the bill, but for want of jurisdiction. None of the matters presented in the motion went to or affected the Court's jurisdiction. It was error to sustain it.

"It will not do, as appellee argues, to urge upon us that the bill ought to have been and was dismissed for want of equity. It is perfectly clear that it was not. On its face the order in terms

declares that the bill was dismissed because the motion of April 20, 1937, to dismiss for want of jurisdiction, was sustained.

"We do not decide, the matter is not properly before us for decision, whether, if the matters relied on by defendant were all set out in the bill, a cause of action in equity would be stated. We merely decide that it was error to dismiss the bill for want of jurisdiction, and we remand the cause for further and not inconsistent proceedings. We make no direction as to, or limitation upon, the further action of the Court, except that the case may not be dismissed for want of jurisdiction, but must be retained to be determined on its merits as they appear from the bill and the proofs, if any, offered in its support."

In *J. Dreher Corporation v. Delco Appliance Corporation*, 93 F. (2d) 275, the Court held that whether a contract was definite enough to be enforced would not be determined on appeal from a judgment dismissing the complaint for insufficiency on its face in an action brought for the breach of such contract since that was not a defect which could be reached by challenge to the pleadings.

In the case at bar the effect of the lower Court's ruling is to determine the merits of Tanforan's application against Tanforan, not after a *hearing*, but upon a *preliminary motion to dismiss*. Such a ruling and such a result should not be permitted by this Honorable Court and a rehearing should be granted to correct this error.

THE SETTLEMENT AGREEMENT DID NOT EFFECT A RELEASE OR WAIVER OF THE RIGHT OF TANFORAN COMPANY TO RESTORE ITS PROPERTY AS PROVIDED FOR IN THE FINAL JUDGMENT AND DID NOT CONSTITUTE A SATISFACTION OF SAID JUDGMENT.

The allegations of the undenied ancillary bill filed by Tanforan would support a finding that the agreement did not constitute a satisfaction of the judgment. We have completely discussed in appellant's opening brief the proposition that appellant's right to restore its property was a part of the consideration awarded to it in the main case for the taking thereof and that its right to this compensation is protected both by the judgment and the Fifth Amendment. The *right* of appellant to restore its property must be distinguished from the *obligation* imposed upon the United States to pay for the expense of doing the work of restoration. The burden of this expense was an *obligation* imposed upon the United States, which is separate and distinct from the *right* of restoration which was awarded to the Tanforan Company. The release in the instant case does no more than to witness the full satisfaction "of the obligation of the government to restore" appellant's property and to "remise, release and forever discharge the government, its officers, agents and employees, from any and all manner of actions, liabilities and claims *against the government*, its officers, agents and employees, for the restoration of said property, etc."

These words purport to do nothing more than to relieve the government of its *obligations* and to release it from any claims *against it* which might arise out of the subject matter of the agreement. There is nothing in the agreement which either expressly or by implication purports *to waive the right of the appellant to restore its property* in accordance with the provisions of the decree. In fact, the officers of the Navy who drew up this agreement and who executed it on behalf of the government affirm in writing *that the express understanding between the parties was expressly to the contrary.* The rule of construction as applied to a written release is stated in 54 C. J. 1241:

> "A release should be construed from the standpoint of the parties at the time of its execution, and in the light of their relations and their situation at the time it was formulated, and of the circumstances which surrounded the transaction; and extrinsic evidence is admissible to show the surrounding circumstances and the nature of the transaction to which the release was designed to apply." (Citing many cases.)

It is a fundamental rule of law that the general words in a release are restricted and controlled by any limiting language contained in recitals in the release which expresses more specifically the intention of the parties. The general rule in this regard is stated in 45 *Am. Jur.* 692 et seq., in Sections 28 and 29, and one of the cases cited in support of the text is *Van Slyke v. Van Slyke* (N. J.) 78 Atl. 179, 31 L. R. A. N. S. 778.

In the *Van Slyke* case a controversy existed between Evert Van Slyke and others in regard to certain probate proceedings and other matters. These controversies were settled by the execution of a release which is set out in full in the opinion. The language of the release is as comprehensive as it is possible to make it. Evert Van Slyke agreed on behalf of

> "myself, my heirs, executors, administrators and assigns, to remise, release and forever discharge" the releasees "from all and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings . . . claims and demands whatsoever, in law or in equity, which against them I ever had, now have, or which my heirs, executors, administrators or assigns hereafter can, shall, or may have for, upon, or by reason of any matter, cause or thing whatsoever" etc.

After the release was executed the administrator of Evert Van Slyke brought suit against the adverse parties to collect a promissory note.

The trial Court upheld the release as effective to cancel the claim asserted on the note, and this holding was reversed in the Supreme Court. The Court quotes from *Rich v. Lord*, 18 Pick. 325:

> "General words, though the most broad and comprehensive, are to be limited to particular demands, where it manifestly appears, by the consideration, by the recital, by the nature and circumstances of the several demands to one or more of which it is proposed to apply the release, that it was so intended to be limited by the parties. And for the purpose of ascertaining that intent every part of the instrument is to be considered.

Practically the same conclusion as that above stated was reached in the case of *Texas and Pacific Railway v. Dashiell*, 198 U. S. 521, 49 L. Ed. 1150. There an individual who was injured in an accident signed a release which recited in part:

> "I hereby release and acquit and by these presents bind myself to indemnify and forever hold harmless said Texas and Pacific Railway Company from and against all claims, demands, damages, and liability, of any and every kind or character whatsoever, for or on account of the injuries and damages sustained by me in the manner and upon the occasion aforesaid and arising or accruing or hereafter to arise or accrue in any way therefrom."

The release went on to specify the particulars in which this person had been injured. Thereafter the party signing the release brought an action in damages against the railway company for the injuries he had suffered in the accident mentioned in the release but which were not specifically enumerated on the face of the release. The United States Supreme Court held that the enumeration of specific injuries listed in the release limited the general language contained therein, and the release was not effective as to any injuries except those which were expressly described on its face. The Court said:

> "And the rule of construction should not be overlooked that general words in a release are to be limited and restricted to the particular words in the recital. The rule is illustrated by the case of *Union Pacific Railroad Company v. Artist*, 60 Fed. 365, 23 L. R. A. 581."

Common sense tells us that the rule above stated is the only one whereby an equitable result can be secured. However, in the instant case it is not necessary to go to the full extent of the rule referred to. In the instant case the owner, who is the appellant here, releases none of its own rights as established by the decree, but only an obligation which that decree imposes on the United States government. It specifies that the release applies only to "all manners of actions, liability and claims against the government"; that is, it releases its right to take affirmative action against the government which is designed to require the government to bear the burden of expense consequent upon the performance of the work of restoration.

It is an elementary rule of law that every contract contains an implied covenant of good faith and fair dealing between the parties. This implied covenant stems from the principle that the courts expect and demand that parties solemnly executing agreements shall observe the rules of common honesty and fair dealing and that one of the parties will not resort to sharp practice in order to deprive the other party of the benefits which the agreement is supposed to confer upon him. See *LaSheele v. Armstrong*, 263 N. Y. 79, 188 N. E. 163-7. There the New York Court of Appeals declared:

> "In every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the rights of the other party to receive the fruits of

> a contract, which means that in every contract there is an implied covenant of good faith and fair dealing."

The same rule is accepted by the Supreme Court of the State of California. See *Tanner v. Title Insurance*, 20 Cal. (2d) 814 at 825:

> "Every contract contains an implied covenant on the part of each party not to prevent or hinder performance by the other party. (*Williston on Contracts*, Vol. 5, Sec. 129-a)"

When Tanforan Company entered into an agreement which saved the United States government over $533,000.00 and relieved it from a burdensome duty, it was entitled to receive the fruits of this agreement; the benefits of its bargain. It is acknowledged that the intention of the agreement and the purpose of the Tanforan Company in the making it (concurred in by the United States through its agents) was to effect a more immediate and speedy completion of the work of restoration. This was the consideration, the *quid pro quo* which the Tanforan Company was to receive. That fact is admitted by the agents of the Civilian Production Administration themselves, for its Compliance Commissioner rendered a written decision on the application of this appellant to be permitted to proceed to do this work, which is quoted in part in our ancillary bill (T. R., p. 16) and reads as follows:

> "It thus appears that the United States, and I do not here distinguish between agencies and departments, has induced the Company, for the distinct benefit of the United States, to accept a settlement and has permitted the Company to commit itself by resuming possession of the

premises and doing a large amount of work, the United States being fully advised that the impelling consideration leading the Company to accept the settlement was the expectation of being able to restore the premises quickly so as to have the use of them by October 12, 1946. The United States has, in large part, received its *quid pro quo* under the settlement."

ASSUMING THAT THE RESTORATION AGREEMENT WAS, IN EFFECT, A SATISFACTION OF JUDGMENT, THE FACTS PLEADED BY APPELLANT IN ITS COMPLAINT WOULD JUSTIFY THE SETTING ASIDE OF SUCH SATISFACTION FOR WANT OR FAILURE OF CONSIDERATION OR FOR MISTAKE OR FOR NON-PERFORMANCE OF A CONDITION.

Assuming, without conceding, that the restoration agreement could be considered a satisfaction of the judgment in the condemnation suit, an application to set aside such a satisfaction of judgment would be proper in the same suit, and an independent suit for that purpose would not be necessary or proper.

In the case of *Argue v. Wilson*, 3 Cal. App. (2d) 635, a satisfaction of judgment which was entered was set aside upon motion to vacate such satisfaction of judgment in the same case. The Court held that the order setting aside the satisfaction of judgment was properly made in the immediate action in which the judgment was entered.

In *Clark v. Johnston*, 49 Cal. App. 315, the Court held:

> "Of course a party to the record may have a satisfaction, entered in fraud of his rights, set aside on motion in the immediate action in which the judgment is entered. (*Haggin v. Clark*, 61 Cal. 1)"

In *Kinnison v. Guaranty Liquidating Corp.* 18 Cal. (2d) 256, the Court said:

> "It is settled that where a satisfaction of judgment has been erroneously entered, it may be cancelled either upon motion made in the original

action, or by means of an independent action in equity between the parties."

See also:

Merguire v. O'Donnell, 139 Cal. 6;
15 *Cal. Jur.* 273;
2 *Freeman, Judgments*, Fifth Ed., p. 2410 et seq.
51 A. L. R. 243.

The cases are legion which hold that a satisfaction of judgment may be vacated in the immediate action for any of the following grounds: fraud, duress, undue influence, mistake, lack or failure of consideration, and non-performance of condition.

In the case at bar the allegations of the appellant's ancillary bill in equity would justify a finding that the satisfaction of judgment (assuming the agreement to be a satisfaction of the judgment) was entered into through mistake and, therefore, could be set aside and the relief prayed for granted.

51 A. L. R. 248.

The facts pleaded would also support a finding that there was a lack or failure of consideration justifying the same relief. See cases cited in 51 A. L. R. 253.

The same facts would justify the same relief for non-performance of a condition. Where a judgment is satisfied on condition that certain things will be done and there is a breach thereof, the parties satisfying the judgment can have the satisfaction set aside. See cases cited 51 A. L. R. 254. See also:

49 C. J. S., Sec. 584, page 1069;
34 C. J., Sec. 1132, page 734.

In the case at bar if the agreement constituted a satisfaction of judgment, the judgment was satisfied only in consideration of the payment of certain sums, the transfer of certain property, and the retention of the right to restore the property. If the right to restore the property is taken away or for some reason can not be had, the satisfaction should be set aside upon application of the party in whose favor the judgment runs—in this case Tanforan Company, Ltd.

If, instead of summarily granting the government's motion to dismiss, the lower Court had received evidence of the facts and circumstances surrounding the execution of the agreement and had found that there was a lack or failure of consideration or that the agreement was entered into under mistake or that there was a non-performance of a condition which constituted the motivating consideration for the execution of the agreement, the Court had the power and jurisdiction in the immediate action to so find and to declare that the settlement agreement or "satisfaction" be cancelled and set aside and that the government be restored in *status quo* by restoration of the consideration received by Tanforan Company from the government and that the judgment be reinstated and declared to be in full force and effect. Under such a decision by the lower Court Tanforan Company could have compelled restoraton of its premises at the government's expense and free from interference by the Civilian Production Administration, as work performed by the Navy would, of course, be exempt

from the effect of the regulations of the Civilian Production Administration. The District Court simply misinterpreted the true nature of the appellant's bill in equity, misinterpreted it as an application for relief under the contract, rather than under the judgment, as it clearly was, and granted the government's motion to dismiss and was in error in so doing.

The appellant was entitled to have the error of the lower Court corrected by this Honorable Court, and we respectfully submit that it was not within the province of this Honorable Court on appeal to hold for itself that the agreement constituted a satisfaction of the judgment and affirm an order made in the Court below upon other grounds.

There was no holding in the Court below that the restoration agreement constituted a satisfaction of judgment. That was not the ground for the lower Court's holding. That the ruling of the lower Court was in error in taking this view is unquestionable under the authorities cited in appellant's opening brief, the effect of which, we respectfully submit, this Honorable Court completely ignored.

The opinion of this Honorable Court states that there is an entire absence of any showing of sharp practice on the part of the government in arriving at the settlement. This statement implies that if there had been a showing of sharp practice, equity would give relief from the apparent effect of the document. Sharp practice is not the only ground for relief in equity. Equity recognizes other grounds, such as mistake and lack or failure of consideration. These are

the grounds pleaded by Tanforan. One can always go behind the wording of a document to explain its effect and the true intent of the parties. Failure of consideration justified the vacating of a satisfaction of judgment. 2 *Freeman Judgments*, Section 1166, page 2413.

The case of *Braselton v. Vokal*, 53 Cal. App. 582, was an action to compel the conveyance of real property. Plaintiff's action was based upon a written option given by the defendant for a recited consideration of $10.00 paid. It was held that the defendant might prove by oral evidence that there was no consideration for the option. The Court said:

> "That the law in California permits parol proof to show the want of consideration in written executory contracts is beyond question."

In *Royer v. Kelly*, 174 Cal. 70, the Court says:

> "The recitals of the two agreements furnish presumptive evidence of a valuable consideration. But the rule is that the parties are not stopped by recitals in agreements with respect to its consideration. The consideration, or the want of consideration, may always be shown by extrinsic evidence for the purpose of impeaching a contract, notwithstanding that it states facts which show a valuable consideration. (Citing cases). The question must, therefore, be determined *by an examination of the evidence.*" (Emphasis ours)

See also:

Stanton v. Weldy, 19 Cal. App. 374;
Chaffee v. Browne, 109 Cal. 211;
National Hardware Co. v. Sherwood, 165 Cal. 1;
Richardson v. Lamp, 209 Cal. 668;
79 *U. of Pa. L. Rev.* 227.

If there is a failure of consideration, oral evidence is admissible to prove it. See

Massie v. Chatom, 163 Cal. 772;
Jefferson v. Hewitt, 103 Cal. 624.

Likewise, oral evidence is admissible to prove mistake, duress, or undue influence, lack of capacity, etc., although the document is in writing. The law is very clear to that effect.

In the case at bar the allegations of the pleadings of appellant set out facts which, if established, would afford relief to the appellant from the apparent effect of the terms of the restoration agreement. These facts for the purpose of the motion to dismiss *must be taken as true.* We respectfully submit, therefore, that on appeal from an order granting a motion to dismiss the Court should not for itself decide the ultimate fact. Can it be urged that if upon a trial of the issues, both parties were to come into court and admit that the restoration agreement was not a satisfaction of the judgment, and that it was not so intended, and that there was a failure of consideration or a mistake of fact or of law, that the Court would, nevertheless, in spite of such evidence and complete agreement of the parties as to the effect of the agreement, hold to the contrary and that the agreement was a satisfaction? How then, with an issue of fact raised by Tanforan's pleading, can this Court determine the effect of the agreement and decide the *facts?*

The decision of the Circuit Court seems to hold, in effect, that notwithstanding the uncontroverted allegations of fact that the agreement was not in-

tended to constitute a release of the right of Tanforan Company to restore, the trial Court would be compelled to hold otherwise. The restoration agreement was executed by Tanforan upon the assumption that it would be permitted to immediately restore the track. If Tanforan had known that it could not restore, it certainly would not have entered into the agreement and would have continued to accept $80,000.00 per year rental until the track was restored by the government in accordance with the decree.

The principal consideration for the execution of the agreement by Tanforan was its belief that it could immediately restore the premises. The government knew that that was the assumption of Tanforan and the prime, motivating consideration for the execution of the agreement by Tanforan. If that consideration failed or if there was a mistake of fact or of law, Tanforan Company would be entitled to relief. The allegations of its pleadings established such facts. The facts are not denied or contradicted, and they must be assumed, for the purpose of the motion to dismiss, to be true. The authorities support the position of appellant, but the decision of the Circuit Court completely ignores the effect of the admitted facts and the authorities cited by appellant in holding that the agreement is a satisfaction of the judgment, and that appellant is without remedy.

The Court below did not hold that the agreement was a satisfaction of judgment. The Court below held that the procedure taken by appellant was incorrect. In our opening brief on appeal we have

shown conclusively, and it is conceded by the government, that the procedure taken by Tanforan Company was correct. Now we find the Circuit Court on appeal upholding the decision *on a totally different ground.*

Wherefore we respectfully submit that a rehearing of this cause be granted and that the order of the lower Court dismissing the complaint be reversed, and that the matter be referred to the Court below for a trial of the issues of fact presented by appellant's complaint.

Respectfully submitted,

JAMES F. BOCCARDO

Attorney for Appellant.

CERTIFICATE OF COUNSEL

The undersigned counsel for appellant does hereby certify that in his judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

JAMES F. BOCCARDO

Attorney for Appellant.